U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 27 September 2004

CASE NO.: 2003-LHC-662
OWCP NO.: 5-71641

In the Matter of:

HENRY V. JACKSON,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Self-Insured Employer.

Appearances: Gary R. West, Esq.
For the Claimant

Benjamin M. Mason, Esq.
For the Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER – GRANTING MODIFICATION

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Employer is seeking modification of a prior award of temporary total disability compensation alleging that Claimant is now only partially disabled. Claimant is seeking modification of that same award alleging that he became permanently and totally disabled on July 3, 2000.

A formal hearing was held in this case on May 20, 2003 in Newport News, Virginia at which both parties were afforded a full opportunity to present evidence and arguments as provided by law and applicable regulation. Claimant offered exhibits 1 through 6 which were admitted into evidence.[1] Employer offered exhibits 1 through 7 which were admitted into evidence. ALJX 1 through 3 were marked for identification and admitted into evidence without objection. The record remained open after the hearing to allow Employer to obtain and submit a report of an independent medical examination. That report was received on June 4, 2004, and is

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

hereby admitted as EX 8 without objection. Both parties filed post-hearing briefs.[2] The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. STIPULATIONS

The parties have stipulated (Tr. 5-6; ALJX 3) and I find that:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at all relevant times.
3. Claimant sustained an injury arising out of and in the course of his employment on August 11, 1989.
4. A timely notice of injury was given by Claimant to Employer on August 11, 1989.
5. Claimant filed a timely claim for compensation.
6. Employer filed a timely first report of injury and notice of controversion.
7. There has been voluntary payment of temporary total disability compensation by Employer for 614 5/7 weeks beginning August 9, 1991 at a rate of $205.77 per week for a total of $126,489.76.
8. Claimant's average weekly wage at the time of his injury was $308.65 yielding a compensation rate of $205.77.

II. ISSUES

The following unresolved issues were presented by the parties:

1. The nature and extent of Claimant's disability.
2. The availability of suitable alternative employment.

III. STATEMENT OF THE CASE

Testimonial and Non-Medical Evidence

On August 5, 1992, Administrative Law Judge Richard K. Malamphy issued a decision and order awarding temporary total disability compensation at the rate of $205.77 from August 9, 1991 and continuing. EX 1.

Employer commissioned a Labor Market Survey which was completed by William Kay on October 24, 2002. EX 6.

[2] Employer filed its post-hearing brief on August 24, 2004, beyond the date set for filing briefs, accompanied by a motion for enlargement of time within which to file its brief. The motion was unopposed by Claimant. I will therefore grant the request and consider Employer's argument in deciding this case.

On October 28, 2002, William Kay wrote to Claimant notifying him that he had located eight possible positions that Claimant should be able to perform. EX 7. Copies of the identified jobs were enclosed. *Ibid*.

Henry V. Jackson

Claimant testified he felt "bad" and had severe pain in his back, neck, and legs which has increased over the years. Tr. 17. He has a "[v]ery limited" ability to walk and drive, and the medication he takes for pain does not help. Tr. 18. When asked to describe a "typical day," he testified:

> It's all I can do to get up in the morning. I just thank the Lord I'm awake. You know, you try to make it through the day. I try to walk. I try to do a little exercise, whatever I can do, you know, hoping I can get better, but it's just a challenge just to – it's a challenge just to get up.

Tr. 18. He lives with his mother and is not able to help with any chores around the house. Tr. 18-19. He has fallen four or five times because his "leg just gives away." Tr. 19. He tries to sleep in the afternoons whenever he can, but it is difficult because of his pain. Tr. 19-20. It has been "years" since he was able to sleep an entire night. Tr. 20. Claimant testified that his memory is not as good as it used to be. *Ibid*.

Claimant has not worked anywhere since leaving his employment with Employer. Tr. 20. He began working for Newport News in 1988. Tr. 21. He does not remember what work he did before that. *Ibid*.

When asked what doctors he had seen because of his falls, he testified "I've been to Morales. The reason I don't go to doctors, I just have problems with them." Tr. 21. He "get[s] irritated by them." Tr. 22. He told Dr. Morales about his falls, and about the pain he was experiencing, but Dr. Morales could not determine why he was falling. Tr. 22. The last documented visit by Claimant with Dr. Morales was July 23, 2002. *Ibid*. Claimant saw Dr. Morales recently and did not know why he had not provided anybody with records of that visit. Tr. 23.

Claimant was seen by Dr. Allen, a clinical psychologist, on May 9, 2003. Tr. 23. His report of evaluation notes that Claimant was not cooperative in the evaluation. Tr. 24. Claimant testified: "I went – when I got to the lab my pain level was so high I couldn't stand it, and I told him that." *Ibid*. Claimant did not understand why he was going to see Dr. Allen, and his pain interfered with his responses to the tests conducted by Dr. Allen. Tr. 24-25.

Claimant did not remember seeing a letter from Employer's vocational expert dated October 28, 2002 with an attached list of job opportunities in the Elizabeth City, Ahoskie, and Camden areas. Tr. 25. When asked if he had applied for any jobs since leaving Newport News, Claimant testified that he had "talked to people about going back to work but not actually going and filling out[] applications." *Ibid*. He further testified: "Everyone I just talk to basically just says, who's going to hire you when you look like that." *Ibid*. The last time he spoke with

anyone about a job was "a week or two ago" when he spoke to the manager at a Food Lion in Elizabeth City. Tr. 26. When asked why he did not get the job, Claimant testified:

> Yes, sir. I'll put it to you this way, I've always been honest. And going to work for people – and I know how much I can do. I know what I can do. And – and I feel bad. I don't know how you-all feel, but I can't go to work for people.
>
> It's just a challenge just to get up because you don't sleep nights. You may – you may get three or four hours of sleep in four or five days.

Tr. 26. Claimant talked by phone with "a few people" other than the manager at Food Lion about jobs. Tr. 29. He testified:

> A few of them I know. And a lot of them, you know – like I notice that the one – you know, a lot of them, you know, I look in the paper and I see stuff that maybe, you know – you just talk and see how people pretty much think. You know, I hate telling people I can't do things. It's not right. It's always been that way. I don't want people to pay me, you know, if I can't do the work.

Ibid. Claimant testified that he knows he cannot work and only calls to inquire about jobs because he knows that is what Employer wants him to do. *Ibid*.

According to Claimant, he believes he saw a letter from Employer's vocational expert regarding possible jobs sometime within two or three weeks before the hearing. Tr. 30. It was after seeing the letter that he called the Food Lion. Tr. 31. That was the only employer he called. Tr. 32. When asked how it was that the manager at Food Lion told him "Who's going to hire you when you look like that," Claimant responded:

> Well, I told him about my condition. I had been in there before. I had been there before, not – not for a job, and he – you know, he knew me.
>
> . . . .
>
> And this man knew me when I walked in there. He knew me. And when I called him, he, you know, said, Why – why – you can't – you can't even do anything. You can't work. You can't hardly stand. So, you know, I wish I could.

Tr. 32-33.

Claimant acknowledged that he previously met with Charles DeMark, the vocational expert employed by his attorney in this case, but he did not know the reason for the meeting. Tr. 33. DeMark asked him about his job, his surgery, "and that kind of thing." *Ibid*.

Francis Charles DeMark, Jr.

DeMark testified that he is a rehabilitation counselor with Coastal Vocational Services in Portsmouth, Virginia. Tr. 35. He has a Master's degree in rehabilitation counseling from Virginia Commonwealth University, which he got in 1973, and obtained a Bachelor's degree from Williamsburg College in Williamsburg, Virginia in 1980. Tr. 36; CX 4. He joined Costal

Vocational Services in 1996, was employed with Atlantic Rehabilitation Services from 1989 to 1996, and was Director of Rehabilitation for the Conference of Medical Rehabilitation Center of Hampton Roads before that. *Ibid*. He is certified by the United States Department of Labor, Office of Workers' Compensation Programs, to provide services to clients referred to him by OWCP offices in Jacksonville, Florida, Norfolk, Virginia, and Washington, D.C. Tr. 37. He is also certified by national and state professional organizations and is licensed in the Commonwealth of Virginia. *Ibid*.

Claimant's case was referred to DeMark in late March 2003. Tr. 38. He met with Claimant on April 8, 2003 after first reviewing his file, including medical records from Drs. Morales, Wayne, Holden, and Pushkin, as well as Claimant's deposition testimony. *Ibid*. DeMark administered a Wide Range Achievement test which indicated that Claimant was reading at a 5.5 grade level, spelling at a 7.3 grade level, and computing math at a 4.1 grade level. Tr. 39. He also administered a Slosson Intelligence Test that reflected Claimant had "an IQ of 67 which places him in the borderline range of intelligence." *Ibid*.

DeMark referred Claimant to Dr. Allen, a clinical psychologist, because he wanted "a more detailed evaluation of the results of the IQ and general intellectual testing." Tr. 41. He was also concerned "that there was an element of depression or mental health issues that . . . could be an issue in terms of helping or understanding whether or not he was able to return to productive work employment." *Ibid*. Dr. Allen completed a Global Assessment of Functioning ("GAF") form on which he indicated Claimant had a score of 30. Tr. 43. According to the form, that score indicates the individual's behaviors are considerably influenced "by delusions, or hallucinations, or serious impairment in communication [or] judgment; sometimes incoherent acts, grossly inappropriate suicidal preoccupation or inability to function in most all areas; stays in bed all day and [has] no job or no friends." *Ibid*.; CX 2 at a. Dr. Allen also completed a Social and Occupational Functioning ("SOFA") form indicating a score of 30. *Ibid*. That score reflects, *inter alia*, an inability to function in almost all areas. *Ibid*.; CX 2 at b Dr. Allen prepared a narrative report of his evaluation of Claimant dated May 9, 2003, which reflected an IQ of 64. Tr. 44. An IQ score of 64 places Claimant in the "mildly mentally retarded" range. Tr. 45.

According to DeMark, the labor market in Hertford, North Carolina is "[v]ery difficult and very rural." Tr. 45. Its primary business is agriculture, although there is some manufacturing, a small retail business section, and "a couple of boat yards with little boats." *Ibid*. The unemployment rate in that portion of the state is approximately 7 percent. Tr. 46. Available jobs listed in the local want ads included "[n]urses, medical people, [and] truck drivers." *Ibid*. In DeMark's opinion, Claimant is unemployable. *Ibid*. He testified:

> [W]hen you look at his limited education, you look at his limited IQ, and again, the psychological factors involved, plus the combination of physical restrictions, which, basically, the physical – the reports from the medical doctors that I reviewed talk about light or sedentary occupations. And, again, he – he has no educational foundation to be able to do jobs that would be considered light or sedentary.
>
> The other issue I have a concern about is his ability to learn new jobs.

> And then, lastly, the issue of competition. I think a cautious employer would – just would not consider Mr. Jackson for any work. He also doesn't have any real transferable skills. His work history – his work history prior to the Shipyard basically involved work as a – a laborer. He worked – did some work in a hospital food service for a while.

Tr. 46-47.

DeMark testified that Claimant confirmed when they met on April 8, 2003 the information contained in a report by Mr. Kay concerning his prior employment . Tr. 48. Claimant also talked to DeMark about his educational background, and DeMark obtained copies of his high school and college records. Tr. 48-49; CX 3. His college transcript reflected mostly "W's" and "F's" and "did not completes." Tr. 50. Over the course of five semesters, he had passing grades in Ancient History, Flag Football, Medieval History, Technical Problems in Public Schools, English, First Aid and Safety, and he made an "A" in Basic Movement. Tr. 50-51. His grade-point-average when he left school in 1974 was 0.8. Tr. 51. He was on academic probation four of the five semesters he spent in college. Tr. 52. Before going to work for Employer, he served in the Army, worked in supply, and was honorably discharged. Tr. 52-53.

DeMark testified that he did not prepare a written report concerning his vocational assessment of Claimant because Dr. Allen's report was "crucial" to completing that task and he did not receive Dr. Allen's report until the day before the hearing. Tr. 58-59.

William Yelbertin Kay

William Kay testified that he is employed by Genex Services, has a Bachelor's degree in psychology from Old Dominion University, and completed the course requirements, but not the thesis, for a Master's degree in Human Resource Management at Norfolk State. Tr. 63. Kay is a Certified Rehabilitation Counselor and is certified by the Commonwealth of Virginia as a "Certified Rehab Provider." *Ibid*. His first professional job was teaching at the college level for three years, and he was thereafter employed by the State Department of Rehab Services as a rehabilitation counselor for just over 28 years. Tr. 64. He retired from that position in 1996 and worked for two years thereafter as a Medical Social Worker in Elizabeth City. *Ibid*. He then worked for Concentra Managed Care for a year running job workshops, and then went to Resource Opportunities, Incorporated (later bought out by Genex) where he continued conducting job workshops and did one-on-one direct placements and Labor Market Surveys. Tr. 65.

Kay was asked by Employer in August 2002 to provide a Labor Market Survey in this case. Tr. 66. He completed that task on October 24, 2002. *Ibid*. The medical information he had was "skimpy" and it was "an old case." *Ibid*. He reviewed reports from Drs. Pushkin and Holden, and it was Dr. Holden's work restrictions that he used for his Labor Market Survey. Tr. 67. Kay got a lot of "background information" concerning Claimant's prior employment from his Newport News employment application. *Ibid*. He did not meet with Claimant. Tr. 68. His vocational evaluation was produced by entering data into a computer reflecting Claimant's prior jobs and length of employment. *Ibid*. Based on a scale of 1 to 6, Kay determined that Claimant

was a "level 3" for reasoning and mathematical development, and a "level 2" for language development. Tr. 69. Kay also determined that Claimant had transferable skills including the ability to drive and to type at 45 words per minute based on his prior "food service type work" and "shipping clerk type work." Tr. 70. Based on Claimant's physical restrictions and employment history, Kay determined that Claimant could obtain employment in the "custodial, unarmed security, and cashier [categories]." Tr. 71. Actual job positions which were available in October 2002 included: two housekeeping positions working for Pasquotank County in Elizabeth City; a janitorial position with the Camden County Board of Education; an unarmed security guard with Alpha Security; cashier positions at Wal-Mart and Food Lion in Elizabeth City; and a toll collector position working for the City of Chesapeake, Virginia. Tr. 72-85. According to Kay, Claimant would be a candidate for all of these positions based on his restrictions and education. Tr. 87.

Kay testified that he is familiar with Hertford, North Carolina, and that Elizabeth City is 11.5 miles from there. Tr. 87-88. Camden, North Carolina is 17 miles from Hertford. Tr. 88. Ahoski is about 45 to 50 miles from Hertford. *Ibid*. He further testified that he believed Claimant had a wage-earning capacity of between $6.50 and $8.50 per hour. Tr. 89. Based on a review of available job information, Kay testified that the jobs identified in his Labor Market Survey remained available to Claimant at the time of the hearing. Tr. 90-92.

On cross-examination, Kay testified that he is not a Certified Rehabilitation Counselor, is not licensed by the State of North Carolina, and is not certified by OWCP to provide rehabilitation services for that agency. Tr. 94. He performed no testing on Claimant and had not met him until the hearing date. Tr. 94-95. He would agree that the ability to function in a job is dependent upon psychological and social capabilities as well as physical and occupational skills. Tr. 95. He was not aware of the GAF and SOFA scores of 30 assigned by Dr. Allen to Claimant prior to the hearing. Tr. 96. He testified "Based on those test results that you have, I would say . . . there are questions of [Claimant's] employability." Tr. 99.

Medical Evidence

On June 6, 1996, Richard T. Holden, M.D., performed an independent medical examination ("IME") of Claimant at Employer's request. EX 2.

Dr. Holden examined Claimant again on March 15, 1999. His assessment was:

> The patient exhibits gross exaggeration and severe extremes of Waddell's. He exhibits no objective data, such as loss of reflexes. He exhibits severe lack of insight. He has no motivation factors based on my previous IME.

EX 2 at j.

A May 3, 1999 electrodiagnostic study of Claimant's bilateral lower extremities was normal. EX 4.

On June 28, 1999, after examining Claimant's nerve conduction studies, Dr. Holden wrote that Claimant's "lack of exertional effort is self-induced limitations." EX 2 at k. Dr. Holden further wrote that Claimant was "quite happy . . . sitting at home doing nothing and being paid something to do nothing," and that he could only estimate what Claimant's functional capacity was since he was "apparently totally uncooperative in terms of demonstrating [what he can do]." *Ibid*.

On June 28, 1999, Dr. Holden completed a work restriction form for Claimant indicating that he could not perform full duty. EX 5.

On December 20, 1999, Douglas A. Wayne, M.D. prepared a report of an IME of Claimant. EX 3. His impression was that Claimant "has an obvious disability syndrome either believing that he is incapable of doing much activities or feigning his efforts." *Id*. at d. There were no objective findings on physical, neurological, or musculoskeletal examination. *Ibid*. Dr. Wayne wrote, in relevant part:

> It is my opinion that the patient could not have this type of pain from the injury described and all of the previous IME's through the years have agreed that he has not shown any significant objective findings but a tremendous amount of pain behavior and inconsistencies. . . .
> . . . .
>
> It is my opinion that there is no medical reason to prevent him from returning to work with or without restrictions. I do not believe that he has any true medical residual disability.
>
> It is my opinion that the patient has long since reached maximal medical improvement and does not need ongoing medical care for this particular problem. He has been through many years of pain group therapy and I can not see how this is of any benefit. I would not recommend further MRI's, plain radiographic studies, or EMG's for his reported work injury.

Id. at d-e.

On March 16, 2000, Yaacov R. Pushkin, M.D. evaluated Claimant "to assess for psychiatric disability," at the request of the Department of Labor. CX 6. In his report, Dr. Pushkin reviewed Claimant's injury-related medical records and summarized his psychiatric, social and work history. *Id.* Dr. Pushkin's mental status examination revealed that Claimant was well-developed, well-groomed, and neatly dressed. He walked with a mild limp, and his "exaggerated and deliberate" movements suggested moderate pain behavior. He remained seated during the interview, his speech was fluent, and there were no gross deficits in orientation, registration, attention, or recall. *Id.* His mood was slightly depressed. His IQ was judged to be low average to borderline. *Id.*

Based on this evaluation, Dr. Pushkin diagnosed Claimant with pain disorder secondary to general medical condition and psychological factors. *Id.* He concluded that Claimant's

exaggerated perceptions of pain and functional disability made it "difficult" for him to consider the possibility of alternate gainful activity. *Id.* Dr. Pushkin explained that Claimant's injury-related physical problems resulted in a feeling of psychological loss.[3] In addition, Claimant's "concrete way of looking at his capabilities" also contributed to this psychosomatic factor. *Id.* As a result, Claimant "exhibits pain behavior that would be in excess of what might be expected for injuries of this nature." *Id.* Dr. Pushkin concluded that "[i]t does appear that he has experienced significant psychological losses and ongoing pain and spasm, which have been perceived to a degree to which he is unable to see himself as a potentially functional person." *Id.* With regard to Claimant's objective level of pain, Dr. Pushkin stated that in Claimant's "defense" one should note that chronic pain disorders often elude diagnostics, and thus it is "conceivable" that Claimant "may suffer from back pain and spasm in the absence of highly distinguishing radiographic changes." *Id.* Dr. Pushkin noted that Claimant had no antisocial history and did not appear to be malingering. *Id.*

Dr. Pushkin was "skeptical" that, after 10 years of evaluations and interventions, any further treatment would substantially change Claimant's prognosis for recovery. He added that psychiatric treatment could "potentially" be of some benefit and maximization of antidepressant therapy may have some yield in terms of mood and pain symptoms. He stated that "[a] vocational rehabilitation referral may also have some utility." *Id.* Dr. Pushkin added, however, that "it is doubtful that he will access other therapies, in light of his concrete perceptions, paucity of psychological resources and geographic location." *Id.* He concluded that "it is unlikely that Mr. Jackson will be able to successfully return to gainful activity, particularly as a physical laborer." *Id.* In particular, he "should be considered permanently disabled in regard to his previous position." *Id.*

A treatment note dated June 4, 2002 reflects that Claimant was seen by Dr. Lawrence Morales and injected with Depo-Medrol and Marcaine in two areas of the low back. CX 1 at a. X-rays showed L5-S1 facet sclerosis consistent with spondylosis and the prognosis was "[g]uarded." *Id*. at b.

On June 25, 2002 and July 23, 2002, Claimant was seen by Dr. Morales and again received trigger point injections in the lower back. CX 1 at c-d.

On May 9, 2003, Roger D. Allen, Ph.D., completed a report of a psychological evaluation of Claimant. CX 5. After administering various objective tests, Dr. Allen diagnosed Claimant with pain disorder associated with both psychological factors and a general medical condition, as well as a depressive disorder. Dr. Allen also concluded that Claimant's general cognitive ability is within the intellectually deficient range, since he has an IQ of 64 as measured by the Wechsler Adult Intelligence Scale – Third Edition. *Id.* at d. He added, however, that "these scores are probably somewhat of an underestimate of his true intellectual ability due to his lack of cooperation with the evaluation, his lack of interest and effort on the test, and his negative emotional state." *Ibid.* He estimated that Claimant's actual intellectual ability is probably closer to the "borderline range" of intellectual functioning, rather than the "intellectually deficient

[3] Dr. Pushkin stated that this sense of loss was particularly great because Claimant's "successes in life were primarily related to his physical prowess" (*e.g.*, he had excelled in baseball and worked as a laborer). *Id.*

range." *Ibid.* Dr. Allen also noted that Claimant could benefit from supportive psychotherapy and antidepressant medications. *Ibid.* at e.

On March 26, 2004, Paul Mansheim, M.D. performed an IME of Claimant regarding his psychiatric condition. EX 8. The findings in his IME report are based on his 45-minute interview of Claimant and a review of Claimant's numerous medical records from various physicians. *Id*. at a. Dr. Mansheim observed that there has never been any clear evidence of physical injury or physical sequelae. *Id.* at h. He also noted that Claimant complained of memory loss and was purportedly unable to recall facts that "people with genuine memory problems have no difficulty remembering," such as where he had worked. *Ibid.* According to Dr. Mansheim, it was significant that Claimant's presentation during his evaluation was very different from that reported by Dr. Pushkin. In particular, while Claimant remained seated during his interview with Dr. Pushkin, he stood most of the time and walked around the room during his meeting with Dr. Mansheim. *Ibid.* Also, while Dr. Pushkin observed no problems with orientation, registration, attention, and recall, Dr. Mansheim noted several such problems. Finally, Dr. Pushkin noted that Claimant's speech was fluent, while Dr. Mansheim found that it was "very difficult to get him to talk about anything." *Ibid.* Based on his evaluation, Dr. Mansheim diagnosed Claimant with malingering psychiatric disorder and stated that "[f]rom the point of psychiatric pathology, it is my assessment that Mr. Jackson is malingering." *Ibid.* He further concluded that Claimant has no limitations as a result of psychiatric impairment which would preclude him from working. *Id.* at i. Dr. Mansheim added that he does not recommend treatment due to Claimant's lack of motivation. *Ibid.*

IV. DISCUSSION

Standard for Modification

Pursuant to Section 22 of the Act, 33 U.S.C. § 922, modification is permitted based upon either a mistake of fact in the initial decision or a change in the claimant's physical or economic condition. *See Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995). It is well established that the party requesting modification bears the burden of proof. *See, e.g., Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 69 (1999), *aff'd mem*., 238 F.3d 414 (4th Cir. 2000) (table). In the present case, Employer is seeking modification of the 1992 award of temporary total disability compensation alleging that Claimant is now only partially disabled. Claimant, in turn, is seeking modification of that same award alleging that he has been permanently and totally disabled since July 3, 2000.

Nature and Extent of Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). Therefore, for the claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of*

America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

Nature of Disability

The permanency of any disability is a medical rather than an economic concept. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain whether the claimant has reached maximum medical improvement ("MMI"). The determination of when MMI is reached, *i.e.*, when the claimant's condition becomes permanent, is primarily a question of fact based on medical evidence and is not dependant on economic factors. *Louisiana Ins. Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask*, 17 BRBS at 60. An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Abbott*, 40 F.3d at 125; *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989).

On August 5, 1992, Administrative Law Judge Malamphy held that Claimant was temporarily totally disabled as a result of the back injury he sustained on August 11, 1989.[4] Claimant now alleges that his work-related disability includes a psychological component, and he asserts that he became permanently and totally disabled on March 16, 2000, as evidenced by Dr. Pushkin's report of that date. Cl. Br. at 5.[5] Employer notes that Dr. Wayne opined in his December 20, 1999 report that Claimant "has long since reached maximal medical improvement and does not need ongoing medical care for [injuries resulting from his August 11, 1989 injury]." EX 3 at d-e. Employer similarly notes that Dr. Pushkin concluded in his March 16, 2000 report that Claimant "should be considered permanently disabled in regard to his previous position" as a result of his pain disorder. Emp. Br. at 9, 15.

It is clear from the record, and both parties agree, that: Claimant has reached MMI; he has some degree of residual disability resulting from his August 11, 1989 work-related injury; and he thus should be considered permanently disabled. Claimant alleges in his post-hearing brief that permanency of his disability occurred on July 3, 2000. Cl. Br. at 2. He subsequently states, however, that he "reached permanent total disability as early as March of 2000." *Id*. at 5. Employer similarly asserts that "Claimant has been at maximum medical improvement . . . since at least July 3, 2000 when Claimant seeks a modification of Judge Malamphy's award of temporary total disability to permanent total disability." Emp. Br. at 9-10.

The record includes several statements from treating and examining physicians that further treatment of Claimant for any physical or psychological impairment would be of little or

[4] The parties do not allege that this determination was based on a mistake of fact and present no evidence to that effect. In fact, Claimant did not submit into evidence the medical records that Judge Malamphy relied upon in his decision. The earliest medical records submitted by Claimant are from 2002. CX 1.

[5] Claimant alleges that "as a result of his injury he is unable to either physically or mentally reenter the workforce in any capacity." Cl. Br. at 5.

no value.[6] As explained below, I find that Claimant has no impairment from any psychological impairment and thus it is necessary to examine the medical evidence relating to Claimant's physical impairment to determine the date of MMI. As noted above, a condition is considered permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Serv. Eng'g Co.*, 15 BRBS at 21, or if his condition has stabilized, *Lusby*, 13 BRBS at 447. Dr. Holden examined Claimant first on June 6, 1996 and then again on March 15, 1999. EX 2 at a-i. At the time of his 1999 examination, he concluded that "a complete set of EMGs should be done of the lower extremities" to provide a basis upon which to evaluate Claimant's disability. EX 2 at j. On June 28, 1999, after reviewing the EMG's he previously ordered (which he found to be absolutely normal), he imposed permanent restrictions and found no further need for treatment. EX 2 a k, EX 5. Based on the foregoing, I find that Claimant's condition is permanent as of June 28, 1999. The question therefore becomes to what degree does Claimant's physical and/or psychological condition impair his ability to earn the wages he was receiving at the time of his work-related injury in the same or any other employment.

Extent of Disability

The question of extent of disability is an economic as well as a medical concept. *Eastern S.S. Lines v. Monahan,* 110 F.2d 840 (1st Cir.); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128, 131 (1991). Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. In order to establish *a prima facie* case of total disability, a claimant must show that he cannot return to his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F. 2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Dir., OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). The same standard applies whether the claim is for temporary or permanent total disability. A claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). A finding of disability may be established based on a claimant's credible subjective testimony. *See, e.g., Dir., OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain).

(1) Claimant's *prima facie* showing of total disability.

As noted above, Claimant is arguing that he cannot return to his pre-injury job as a ship fitter in marine construction due to both physical and psychological limitations. Cl. Br. at 5. Employer acknowledges that "the medical evidence clearly shows that Claimant has work restrictions," and has offered as evidence of his physical restrictions the limitations imposed by Dr. Holden. EX 5; Emp. Br. at 10. On June 28, 1999, Dr. Holden concluded that Claimant could not perform full duty and imposed the following restrictions: lifting floor to waist and waist to overhead 20 pounds frequently, 40 pounds occasionally; pushing/pulling 30 pounds

[6] *See, e.g.*, EX 3 at e (12/20/99 statement by Dr. Wayne that "patient has long since reached maximal medical improvement and does not need ongoing medical care"); CX 6 (3/16/00 statement of Dr. Pushkin noting he was "skeptical that after 10 years of evaluations, interventions, and ongoing symptoms that he will be substantially remedied by any further set of interventions" and "should be considered permanently disabled in regard to his previous position."); EX 8 (3/26/04 report by Dr. Mansheim noting diagnosis of malingering and recommendation of no further treatment due to lack of motivation).

frequently, 60 pounds occasionally; walking/standing 6 hours per day; sitting 8 hours per day; stooping, kneeling, climbing, and bending "occasionally." EX 5. Employer does not dispute that these restrictions preclude Claimant from returning to his pre-injury job,[7] and the evidence of record supports this finding. Where, as here, it is uncontroverted that Claimant cannot return to his usual work, he has established a *prima facie* case of total disability. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998), *Caudill v. Sea Tac Alaska Shipbuilding*, 953 F.2d 552 (1992), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Dir., OWCP*, 8 F.3d 29 (9th Cir. 1993). Based on the foregoing, I find that Claimant has satisfied his initial burden of proving total disability based on his physical limitations.[8]

(2) Suitable alternate employment.

Once a *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternate employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). To do so, the employer must show the availability of realistic job opportunities within the geographical area in which claimant was injured or in which the claimant resides, which he can perform given his age, background, education, work experience, and physical and psychological restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1031. If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See*, *e.g.*, *Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544 (9th Cir. 1991) *rev'g* 24 BRBS 213 (CRT); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant may rebut the employer's showing of suitable alternate employment and retain eligibility for total disability benefits if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. A failure to prove suitable alternate employment results in a finding of total disability. *McDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd*, (No. 86-3444)(11th Cir. 1987)(Unpublished).

As evidence of alternate employment, Employer offered a labor market survey completed by vocational expert William Kay on October 24, 2002. EX 6. In performing this survey, Kay relied on medical restrictions imposed by Dr. Holden on June 28, 1999. EX 6 at d. Claimant asserts, however, that he is "not able to perform any type of work" due to physical and psychological restrictions and that Employer's "limited" labor market survey does not constitute sufficient evidence to support a finding of partial disability. Cl. Br. at 5. As explained below, I find that Employer appropriately based its labor market survey solely on the physical restrictions

[7] According to his post-hearing brief, Claimant testified during the 1992 hearing before Judge Malamphy that he lifted and moved heavy objects weighing well over 50 pounds and that he was lifting one end of a lead block which weighed approximately 200 pounds at the time of his August 11, 1989 injury. Cl. Br. at 3. Light work is defined, in part, as exerting up to 20 pounds of force occasionally. DICTIONARY OF OCCUPATIONAL TITLES, Appendix C (4th ed. 1991). Medium work is defined, in part, as exerting 20 to 50 pounds of force occasionally, while heavy work requires exerting 50 to 100 pounds of force occasionally. *Ibid*. Judge Malamphy previously concluded that his job with Employer exceeded the restrictions of light work. EX 1.

[8] In his 1992 decision and order, Judge Malamphy determined that Claimant had established a *prima facie* case of total disability. EX 1. Thus, in a modification proceeding, Employer has the initial burden of proving that there was a change in Claimant's condition that justifies a reconsideration of this finding. Employer satisfied this burden by submitting evidence of medical restrictions imposed by Dr. Holden subsequent to Judge Malamphy's decision. Thus, the burden switched to Claimant to show that he was unable to return to his pre-injury job under these new restrictions.

imposed by Dr. Holden, and that substantial medical evidence establishes that Claimant has no additional restrictions due to any alleged psychological condition.

Claimant was examined by Dr. Yaacov Pushkin at the request of the Department of Labor on March 16, 2000. CX 6. Based on his interview of Claimant and a review of an unidentified "packet of information supplied by [Theresa A. Magyar, Claims Examiner for the U.S. Department of Labor]," Dr. Pushkin diagnosed Claimant with a pain disorder secondary to general medical condition and psychological factors. *Id*. at 1, 4. Dr. Pushkin stated that "it does not appear that Mr. Jackson is malingering" and concluded it was "unlikely that [he] will be able to be successfully returned to gainful activity, particularly as a physical laborer." *Id*. at 4-5.

On May 9, 2003, Claimant also underwent a psychological evaluation by Dr. Roger Allen at the request of his attorney's rehabilitation counselor, Charles DeMark. CX 5. Dr. Allen reported that Claimant was not cooperative during the examination, stated "I'm tired of this bullshit," and was uncooperative in providing a detailed history. *Id*. at a. The only records reviewed by Dr. Allen were Dr. Puskin's evaluation from March 16, 2000 and some academic records. *Id*. at c. Dr. Allen administered a WAIS-III intelligence test, the scores of which he noted were "probably somewhat of an underestimate of his true intellectual ability due to his lack of cooperation with the evaluation, his lack of interest and effort on the test, and his negative emotional state." *Id*. at d. Like Dr. Pushkin, Dr. Allen diagnosed Claimant with a pain disorder associated with both psychological factors and a general medical condition. He also diagnosed a depressive disorder not otherwise specified. *Id*. at e.

As explained below, I find that the opinions of Drs. Pushkin and Allen are entitled to less weight than the contrary opinion of Dr. Mansheim.

On March 26, 2004, Dr. Mansheim examined Claimant, concluded that he was malingering, and opined that Claimant's ability to work is not limited by any psychiatric impairment. EX 8 at i. His assessment is well-reasoned and based on a thorough examination of Claimant and a review of his medical history. It is also supported by other medical evidence of record. Dr. Mansheim noted, for example, that Claimant's complaints of memory loss are not credible since "the things he complained about not being able to remember are things that people with genuine memory problems have no difficulty remembering."[9] EX 8 at h. His report also notes major discrepancies in Claimant's presentation during his interviews with Drs. Mansheim and Pushkin with respect to his ability to stand, speak, and interact, as well as the extent of his memory impairment. *Ibid.* Dr. Mansheim's opinion is further supported by the lack of any objective medical evidence of pathology that could justify Claimant's subjective complaints of pain and disability, which was previously noted by Drs. Holden and Wayne. *Ibid.* at h; EX 2 and 3.[10] In fact, consistent with Dr. Mansheim's conclusion, Dr. Holden described Claimant's

[9] Even though Claimant was uncooperative when seen at Albermarle Psychological Services on May 9, 2003, Dr. Allen noted that the WAIS-III test reflected "a slight personal strength in immediate memory as indicated by his scaled score of seven on the Digit Span subtest." CX 5 at d.

[10] Dr. Mansheim specifically identified in his IME report the numerous medical records to which he had access before formulating his opinion. EX 8 at a-b. In his historical narrative of Claimant's treatment, he further noted numerous incidents where physicians recorded that objective medical tests were "normal" and Claimant was exaggerating his symptoms. For example, Dr. Garner noted in a September 28, 1998 letter that a myelogram and CAT scan were normal. *Id*. at b. An examining physician at the Newport News Shipbuilding clinic observed on

complaints as "gross exaggerations" and "self-induced limitations," and concluded that Claimant was apparently motivated by a desire to receive disability compensation without having to work. EX 2. Similarly, Dr. Wayne concluded that Claimant had a "disability syndrome," and his purported limitations were either perceived or feigned. EX 3 at d. Even Dr. Pushkin acknowledged that Claimant "exhibits pain behavior that would be in excess of what might be expected for injuries of this nature." CX 6. All these factors are supportive of Dr. Mansheim's diagnosis of malingering.

After having observed his demeanor and listened carefully to his testimony at the formal hearing, I also find that Claimant's credibility with respect to his condition is questionable.[11] For example, Claimant testified that his ability to walk and drive was "[v]ery limited" and, when asked to describe how far he could walk, simply stated "I really can't say." Tr. 18. He further testified that pain medication, including Percodan, Vicodin, Motrin, and Celebrex, did virtually nothing to alleviate his ongoing symptoms of pain. *Ibid*. He then testified that he lived with his mother and that he was unable to help with any chores, including going to the grocery store to do shopping. Tr. 18-19. However, when asked to explain how a manager of a grocery store with whom he spoke over the phone could have said, as he testified, "Who's going to hire you when you look like that," Claimant testified that "I told him about my condition [and] I had been in there before." Tr. 32. Claimant further testified that "this man knew me when I walked in there. He knew me. And when I called him, he, you know, said, Why – why – you can't – you can't even do anything." Tr. at 33. The grocery store in question is a Food Lion which is, according to Claimant, located 20 miles from his house. Such testimony is simply not credible, especially in light of Claimant's testimony that his ability to drive is "[v]ery limited" and he does not help his mother with the grocery shopping Tr. 18-19.

Based on the foregoing, I find that the extent of Claimant's disability is most consistent with the physical limitations described by Dr. Holden in his June 28, 1999 assessment, *i.e.*, lifting floor to waist and waist to overhead 20 pounds frequently and 40 pounds occasionally; pushing/pulling 30 pounds frequently, 60 pounds occasionally; walking/standing 6 hours per day; sitting 8 hours per day; stooping, kneeling, climbing, and bending "occasionally." EX 5. I further find that Employer's vocational expert, William Kay, relied on sufficiently accurate estimates of Claimant's intellectual abilities and aptitudes in performing his labor market survey. In particular, Kay used such objective indicators of Claimant's intellectual abilities as his education, vocational training, and work history. EX 6 at d-h. Kay's labor market survey report correctly states that Claimant graduated from high school, attended college without graduating, and can type 45 words per minute. EX 6 at e. Kay concluded that this background corresponds to the following General Educational Development levels:[12] reasoning and mathematical

---

October 5, 1989 that Claimant responded in an exaggerated fashion indicative of malingering. *Id*. at c. Electromyographic and nerve conduction studies on June 15, 1990 showed no indication of lumbar nerve root compromise or any other peripheral entrapment syndrome. *Ibid*. Dr. Good found no evidence of radiculopathy, plexopathy, or neuromuscular problems during a June 25, 1991 evaluation. *Ibid*. Claimant was found not to have put forth maximum effort during a functional capacity evaluation conducted on March 23, 1993. *Id*. at d. Dr. Holden found Claimant demonstrated gross exaggeration and severe extremes of Waddell's signs on March 15, 1999. *Id*. at e.

[11] I also note that Judge Malamphy, in his 1992 decision, also refused to "lend much credibility to Claimant's testimony" based on the medical evidence and Claimant's lack of cooperation in evaluations. EX 1.

[12] When ranked on a scale from 1 to 6, with 6 being the highest.

development at "3" and language development at "2." Kay's report also indicates that Claimant took a cargo specialists course in the U.S. Army and completed a tack welding training program while working for Employer. *Ibid.* The report further notes the following work history: fitter, shipping, helper, shipping clerk, and dietary worker (hospital). EX 6 at f. On this basis, Kay concluded that the highest Specific Vocational Preparation ("SVP") level achieved by Claimant is "5" or "skilled."[13] I further find that Kay's transferable skills analysis is properly supported by this background information. EX 6 at g.

By contrast, Claimant's vocational expert Francis DeMark relied principally on the results of the WAIS-III intellectual testing administered by Dr. Allen showing that Claimant has an IQ of 64, which places him in the "mildly mentally retarded" range.[14] Tr. 41-45; 58-59. As Dr. Allen acknowledged, however, the results of this testing likely underestimated Claimant's true intellectual ability based on his lack of cooperation during the examination. CX 5 at d. In contrast to the results of Dr. Allen's testing, a Slosson Intelligence Test administered by DeMark showed an IQ of 67 which places Claimant in the borderline range of intelligence. *Ibid*. Furthermore, the Wide Range Achievement test administered by DeMark indicated that Claimant was reading at a 5.5 grade level, spelling at a 7.3 grade level, and computing math at a 4.1 grade level. Tr. 39. These results are more consistent with Kay's assessments of Claimant's intellectual abilities than with Dr. Allen's finding of mild mental retardation. They are also more consistent with Claimant's social, educational, and employment backgrounds, as well as his presentation during the hearing. Accordingly, I give less weight to DeMark's opinion that Claimant is unemployable than the contrary opinion of Kay.

Turning to the various positions identified by William Kay in his labor market survey report, I find that at least seven of those positions are compatible with Claimant's vocational profile and thus constitute suitable alternate employment which is reasonably available to him.[15] Each of these positions is discussed below.

Kay's report first identifies three custodial positions as being available to Claimant: two working for the Pasquotank County government in Elizabeth City, North Carolina and one working for the Camden County School Board in Camden, North Carolina. EX 6 at i. Kay testified that he is familiar with Hertford, North Carolina, where Claimant resides, and that Elizabeth City is 11.5 miles from there. Tr. 87-88. Camden, North Carolina is 17 miles from Hertford. Tr. 88. The salary for the Pasquotank County position is $14,195.00 per year and, at the time of the survey, Pasquotank County had two positions available, one in the County

[13] It appears that Kay mistakenly indicated an SVP level of "8" for the fitter position, but it did not affect his ultimate conclusion that Claimant's highest level was "5."

[14] According to DeMark, Dr. Allen's aforementioned assessments played a "crucial" role in his vocational evaluation. Tr. 41-45; 58-59.

[15] Kay's labor market survey identified a "cashier/toll booth" position in Chesapeake, Virginia as one of the eight positions reasonably available to Claimant. EX 6 at k. Chesapeake, Virginia is approximately 60 miles from Hertford, North Carolina where Claimant lives. The Board has previously held that jobs 65 and 200 miles away are not within the geographical area, even if the employee took such jobs before his injury. *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). Since the remaining seven jobs identified by Employer are more than sufficient to satisfy its obligation to establish the existence of realistically available jobs within the geographical area where Claimant resides, I need not decide whether this job is realistically available to Claimant.

Courthouse and another in the Agriculture Extension Building. The Camden County position paid $8.00 per hour and the employer was interviewing for the position when Kay's labor market survey was prepared. The physical and mental requirements of both positions are consistent with the restrictions imposed by Dr. Holden and Claimant's educational background. EX 6 at l-m.

Kay's report next identifies two unarmed security guard positions working for Alpha Security in Ahoskie, North Carolina. Ahoskie, North Carolina is located 45 to 50 miles from Hertford. Tr. 88. The jobs pay $5.75 per hour and Kay's report notes that Alpha Security also had openings for gate guard and school resource officers during the time he was preparing his labor market survey. EX 6 at j. During the preceding month Kay had in fact placed one client with that employer as a school resource officer. *Ibid*. The duties and responsibilities of an unarmed security guard, including the physical and mental requirements of the job, are clearly consistent with Claimant's capabilities. EX 6 at o.

Kay's report also identifies two cashier positions in Elizabeth City, North Carolina: one at Wal-Mart; and the other at Food Lion. EX 6 at j. The cashier position at Wal-Mart paid $6.25 per hour while the Food Lion position paid $5.15 per hour. Wal-Mart was taking applications at the time of the labor market survey for starting shifts of from 4 to 6 hours.[16] Food Lion had hired cashiers during the time of the labor market survey and was continuing to take applications for starting shifts of less than 6 hours. EX 6 at k. The job duties and physical requirements of the positions are within Claimant's limitations.[17] EX 6 at p, q.

Kay's labor market survey further notes that, according to a publication by the North Carolina Employment Security Commission entitled "2000 Occupational Employment Statistics combined wage file," there are about 1,050 maintenance positions, 70 security guard positions, and 1,540 cashier positions[18] available in the relevant geographic region including Elizabeth City, North Carolina. EX 6 at i-j. This evidence further establishes that there is a range of jobs which are reasonably available to Claimant and which he could realistically secure and perform. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *Green v. Suderman Stevedores*, 23 BRBS 322 (1990).[19]

---

[16] The Board has held that a part-time job may be suitable alternate employment stating that "[a]ny difference in hourly pay or other attendant benefits can be considered when establishing the monetary benefits to be paid for such partial disability." *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985).

[17] As Kay noted in his report, Claimant "could be employed in cashier positions since he has worked in clerical type positions in the past and had the ability to take advanced math in high school." EX 6 at j. Furthermore, each of these positions involves a maximum standing requirement of 6 hours per day, and does not involve any other physical requirements inconsistent with the restrictions imposed by Dr. Holden. *Id.* I also note that the job description for the Food Lion position is particularly accommodating, as it requires no prior experience or high school degree, provides training, and indicates a willingness to "adapt duties to physical needs." EX 6 at q.

[18] The report notes that the Virginia Employment Commission listed "cashier" on the list of occupations with the largest number of openings, with estimated 90,673 opening in 1998 and projected 112,125 openings in 2008.

[19] In fact, the Board has also stated that it is sufficient for the employer to identify only one actual position that is both suitable for and realistically available to the claimant, if it can demonstrate the general availability of similar positions in the claimant's community during the questionable period. *Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Based on the foregoing, I find that Employer has met its burden of proof by demonstrating, through its October 24, 2002 labor market survey and the testimony of its vocational rehabilitation expert, the availability of realistic job opportunities within the geographic area where Claimant resides, which Claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing.

Wage-Earning Capacity

Where a claimant seeks total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's earning capacity. *See Berkstresser v. WMATA*, 16 BRBS 231, 233 (1984). Partial disability begins when suitable alternate employment is shown. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 12 BRBS 69 (CRT) (D.C. Cir. 1990), *rev'g in part Berkstresser v. WMATA, supra*., and *rev'g on other grounds* 22 BRBS 280 (1989). An administrative law judge must give a dollar figure for post-injury wage-earning capacity and a finding of a percentage loss of wage-earning capacity is not sufficient. *Butler v. WMATA*, 14 BRBS 321, 323-324 (1981). *See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 1267, 9 BRBS 457 (4th Cir. 1978).

Claimant's stipulated average weekly wage at the time of his August 11, 1989 injury was $308.65. Kay testified that, based on the results of his October 24, 2002 labor market survey, he believed Claimant then had a maximum wage-earning capacity of $8.50 and that, averaging the wages of the identified jobs together would result in a wage-earning capacity of $6.50 per hour. Tr. 89. Since I did not consider the "cashier/tollbooth" position in my determination with respect to reasonably available jobs, and that is the only position paying $8.50 per hour, I find that the $6.50 per hour average of the wages from the jobs considered by Kay more accurately reflects this Claimant's wage-earning capacity. However, as Employer's post-hearing brief correctly suggests, Emp. Br. at 14, it is necessary to evaluate this figure in terms of 1989 dollars in order to accurately calculate Claimant's compensation rate for his permanent partial disability. This may be accomplished by comparing either the minimum hourly wage or the National Average Weekly Wage in effect in 1989 with the minimum hourly wage or the National Average Weekly Wage in effect in 2002.[20]

According to the Department of Labor's Wage and Hour Division of the Employment Standards Administration, the federal minimum wage rate in effect in August 1989 when Claimant was injured was $3.35 for all covered, nonexempt workers.[21] The federal minimum wage rate in effect in October 2002, the date of Kay's labor market survey, was $5.15. Thus, the 1989 minimum wage was only 65% of the 2002 minimum wage. Since Claimant's wage-

[20] Employer's brief looks at the wages in effect in 2000 rather than 2002 apparently based on the assumption that Claimant's disability became permanent in 2000. However, as noted above, I have concluded that the most reliable medical information in the record demonstrating the permanency of Claimant's condition is June 28, 1999 when Dr. Holden imposed the permanent restrictions in EX 5. Furthermore, between June 28, 1999 and October 24, 2002, the date of Employer's labor market survey, there is no evidence of suitable alternate employment and Claimant would thus be entitled to permanent total benefits. Thereafter, based on Employer's showing of suitable alternate employment, Claimant became permanently partially disabled and is entitled to compensation at a rate based on his residual earning capacity as of October 24, 2002.

[21] *See* "History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 1996" available at http://www.dol.gov/esa/minwage/chart.htm.

earning capacity in 2002 was $6.50 per hour, his 1989 wage-earning capacity would have been $4.23 per hour, *i.e.*, 65% of $6.50 per hour. In terms of 1989 dollars, Claimant's weekly wage-earning capacity with the limitations resulting from his work-related accident would have been $169.20 ($4.23 per hour times 40 hours per week equals $169.20). Given Claimant's stipulated average weekly wage of $308.65, he thus suffered a reduction in his wage-earning capacity of $139.45 with a resulting compensation rate for his permanent partial disability of $92.97 ($139.45 times 2/3 equals $92.97).

Utilizing the same process but considering the National Average Weekly Wage rates for 1989 and 2002 would, as correctly suggested by Employer, result in a more accurate compensation rate since the National Average Weekly wage rate changes annually whereas the federal minimum hourly wage rate does not. Emp. Br. at 14-15. For August 11, 1989, the National Average Weekly Wage rate was $318.12, while the rate in effect on October 24, 2002 was $498.27.[22] The 1989 rate was thus 64% of the 2002 rate. Multiplying Claimant's wage-earning capacity of $6.50 per hour times 64% results in a wage-earning capacity of $4.16 per hour in 1989 dollars. The weekly wage-earning capacity is thus $166.40 and, when subtracted from Claimant's stipulated average weekly wage of $308.65 results in a loss in wage-earning capacity of $142.25 and a compensation rate of $94.83.

Based on the foregoing, I find that Claimant is entitled to an award of permanent partial disability from October 24, 2002, the date of Employer's labor market survey, at a rate of $94.83.[23]

V. INTEREST

The Benefits Review Board and the federal courts have previously upheld interest awards on past due benefits to ensure that an employee receives the full amount of compensation due. *Santos v. General Dynamics Corp*., 22 BRBS 226 (1989); *Adams v. Newport News* Shipbuilding, 22 BRBS 78 (1989); *Smith v. Ingalls Shipbuilding*, 22 BRBS 26, 50 (1989); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988); *Perry v. Carolina Shipping*, 20 BRBS 90 (1987); *Hoey v. General Dynamics Corp*., 17 BRBS 229 (1985); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The applicable interest rate is the rate used by the United States District Courts in money judgments in civil cases. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Effective December 21, 2000, this interest rate is based on the weekly average 1-year constant maturity Treasury yield for the calendar week preceding the date of service by the district director of the order awarding benefits.

---

[22] *See* "National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))" at http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm.

[23] As noted above, partial disability begins when suitable alternate employment is shown. *Director, OWCP v. Berkstresser*, *supra*., 921 F.2d 306. Since Employer first established the availability of suitable alternate employment through its October 24, 2002 labor market survey, Claimant must be considered permanently and totally disabled between the date of MMI (June 28, 1999) and that date.

ORDER

It is hereby ordered that the August 5, 1992 decision and order of Administrative Law Judge Richard K. Malamphy awarding temporary total disability compensation is hereby modified as follows:

1. Employer shall pay to Claimant compensation for permanent total disability from June 28, 1999 to October 24, 2002 at the rate of $205.77.

2. Employer shall pay to Claimant compensation for permanent partial disability from October 24, 2002 and continuing at the rate of $94.83.

3. The Employer shall receive credit for all compensation that has been paid.

4. Employer shall pay interest on all past due compensation payments at the Treasury Bill rate in effect on the date this Decision and Order is filed by the District Director.

5. The District Director shall perform all calculations necessary to effect this order.

6. Claimant's attorney may file, within 20 days from his receipt of this Order, a fully supported fee application, accompanied by a memorandum of points and authorities establishing entitlement to an award of attorney's fees under Section 28 of the Act, a copy of which shall be sent to opposing counsel.

7. In the event the fee petition described in paragraph 6 above is filed in this matter and objected to by Employer, Employer's attorney shall file, within 20 days from his receipt of such fee petition, a response thereto accompanied by a memorandum of points and authorities contesting Claimant's counsel's entitlement to an award of attorney's fees under Section 28 of the Act.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.